

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2021-03155

XXXXXXXXXXXXXX (MEMBER)

**COUNSEL:** XXXXXXXXXXXX

XXXXXXXXXXXXXX (APPLICANT)

**HEARING REQUESTED:** NO

### APPLICANT'S REQUEST

1. Correct the deceased service member's official military record to reflect active duty service performed for the period 15 Apr 09 to 27 Apr 09. **(Administratively corrected)**
2. She be awarded Death Gratuity payment.

### APPLICANT'S CONTENTIONS

The official military active duty history record erroneously omits active duty service. On 31 Aug 21, DD Form 149, *Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552*, was submitted and on 17 Mar 22, the applicant received a letter in response stating all administrative avenues were not exhausted; therefore, the application was returned without action. On 22 Mar 22, applicant's counsel contacted the Air Force Personnel Center (AFPC) as instructed in the 17 Mar 22 letter. The AFPC representative stated the applicant was correct in applying to the Air Force Board for Correction of Military Records (AFBCMR) as the Air Force Personnel Center (AFPC) could not assist with publishing DD Form 214, *Certificate of Release or Discharge from Active Duty*, outside a 90-day window.

Due to the prolonged processing of the original DD Form 149 and the data omission, there is a denial of legal rights to the applicant. The official military record is contrary to the facts and available evidence and the integrity of the information contained in the official military data repository is also at issue. The official military record is incorrect as it omits performed active duty history and the applicant requested the Board eliminate the injustice and correct the record.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is the widow of a deceased Air Force Reserve senior airman (E-4).

On 13 Sep 05, according to Certification of Marriage, provided by the applicant, she married the service member.

On 1 May 07, according to DD Form 4, *Enlistment/Reenlistment Document Armed Forces of the United States*, the applicant enlisted in the Air Force Reserve for a period of three years.

On 7 Apr 09, according to AROWS-R XXXXX (Excerpt), provided by the applicant, the service member was ordered to Annual Training for the period 15 Apr 09 to 27 Apr 09.

On 16 Aug 09, according to Certification of Death Record, the service member died.

On 24 Sep 09, according to Initial Casualty Report, at the time of death, the service member's status reflected Personnel Affiliation: Not Active Duty and Personnel Category: Other than Active Duty Periods.

On 28 Jan 20, according to Department of Veterans Affairs (DVA) letter, provided by the applicant, entitlement to a Certificate of Eligibility for a Death Gratuity under Title 10, United States Code, Section 1477 (10 U.S.C. § 1477) was not established, stating the service member was released from service on 30 Sep 08, and passed away on 16 Aug 09, representing 121 days from service.

On 18 Mar 20, according to DVA letter, provided by the applicant, entitlement to a Certificate of Eligibility for a Death Gratuity under 10 U.S.C. § 1477 was established, stating the service member's death did result from a disease or injury incurred or aggravated while on active duty or active duty for training or from an injury incurred or aggravated while on inactive duty training.

On 19 Jun 20, according to DD Form 1300, *Report of Casualty*, the service member's Duty Status reflects "Retired effective 30 Sep 08 for years of military service."

On 28 Jul 20, according to Defense Finance and Accounting Service (DFAS) letter, provided by the applicant, her claim for a death gratuity was denied, by operation of 31 U.S.C. § 3702 (six-year statute of limitations also known as the Barring Act).

On 23 Jun 21, according to Defense Office of Hearings and Appeals (DOHA) letter, provided by the applicant, her appeal of the DFAS decision regarding her claim for a death gratuity was denied, by operation of 31 U.S.C. § 3702.

On 2 Feb 22, according to DOHA letter, provided by the applicant, her request for reconsideration of the previous appeal decision was denied, as a final administrative action of the Department of Defense in this matter.

On 6 Jun 22, according to the Point Credit Accounting and Reporting System the applicant's service history was corrected to reflect he earned 13 points for performance of active duty (annual) for the period 15 Apr 09 to 27 Apr 09.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit C.

## **AIR FORCE EVALUATION**

AFPC/DPFCS (Casualty Matters) recommends granting the application. In accordance with 10 U.S.C. § 1476(a)(1) Death Gratuity is payable to survivor(s) of death that occur within 120 days after discharge or release from (A) active duty; or (B) inactive-duty training (other than work or study in connection with a correspondence course of an armed force or attendance, in an inactive status, at an educational institution under the sponsorship of an armed force or the Public Health Service); (2) A death gratuity may be paid under paragraph (1) only if the Secretary of Veterans Affairs determines that the death resulted from an injury or disease incurred or aggravated during (A) the active duty or inactive-duty training described in paragraph (1); or (B) travel directly to or from such duty.

The service member was married to the applicant in 2005 and in 2007 a son was born of the marriage. The service member served in the Army until 15 Jun 06, when he was discharged for a condition, not a disability; however, the DVA determined his condition to be service-connected; therefore, he was receiving disability compensation prior to his entrance into the Air Force Reserve until his death.

On 1 May 07, the service member enlisted in the Air Force Reserve and received orders directing him to active duty from 16 Apr 09 <sup>1</sup>[sic] to 27 Apr 09. On 16 Aug 09, the service member died at his home and cause of death was certified as suicide. Based on the service member's DVA disability rating/compensation from his Army service, on 17 Aug 10, the DVA determined "Service-Connected for cause of death is granted." Shortly thereafter, DVA began paying the applicant Dependency Indemnity Compensation (DIC), as well as paid eligible burial benefits.

Unfortunately, the service member's unit reported his death to the Air Reserve Personnel Center (ARPC) as "non-duty status" and ARPC did not cross-check to validate he had been "in-status/on orders" 120 days preceding his death. As a result, his case was not referred to Department of the Air Force (DAF) Casualty to be processed as a 120-day death, as stipulated in DAF policy. Consequently, between 2009 and 2020, a Casualty Assistance Representative was not assigned to brief the applicant on 120-day death benefits or assist her in filing a Death Gratuity claim.

On 9 Mar 20, DAF Casualty was connected with the applicant through a Department of Defense Gold Star and Survivor Advocate and assisted in completing an application for Death Gratuity for a 120-day Service-Connected Death Determination, and on 18 Mar 20, the DVA sent their determination letter to DAF Casualty stating the service member's death resulted "from a disease or injury incurred or aggravated while on active duty or active duty for training, or from an injury incurred or aggravated while on inactive duty for training." Based on this determination, the Death Gratuity Claim package was sent to DFAS, where it was denied on the basis that it was not submitted within six years of the date the claim accrued. DFAS determined the claim accrued on 17 Aug 10 when DVA ruled the service member's death was service-connected. DFAS acknowledged the eligibility but was barred from paying the claim under 31 U.S.C. § 3702(b), the Barring Act. DOHA upheld DFAS' application of the Barring Act and recommended the applicant seek relief through the AFBCMR.

Based on the inaccurate reporting of the service member's death as "non-duty status", and subsequent mismanagement of his case by ARPC, the applicant was not briefed on eligible death benefits, nor assisted in filing a Death Gratuity claim until after six years and application of the Barring Act. This resulted in the applicant's loss of \$100,000 in benefits and constitutes a gross injustice.

The complete advisory opinion is at Exhibit C.

## **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 6 Apr 23 for comment (Exhibit D), and the applicant replied on 25 Apr 23, 18 May 23, and 29 Jun 23. In response, on 23 Apr 23, counsel forwarded a copy of the AFPC advisory to the Board.

On 18 May 23, counsel requested reconsideration of the 2 Feb 22 DOHA denial of Death Gratuity on the basis of the Barring Act, as the applicant, an eligible beneficiary, satisfied each of the legal elements required for a veteran benefit of the Death Gratuity and made a timely claim considering the newly-obtained and corrected service records. In Aug 09, the Casualty

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<sup>1</sup> 15 Apr 09

Officer denied the applicant's request for Death Gratuity benefits due to the service member not dying within 120 days of release or discharge from active duty, or active duty for training, and no existing determination from the DVA that death resulted from injury or disease incurred or aggravated during such duty. Additionally, counsel addressed the DVA 17 Aug 10 ruling which granted DIC for the applicant, and contended the applicant was verbally denied application for Death Gratuity by the Casualty Office at that time based on ineligibility. In 2019, the applicant found new documentary evidence of active duty that was missing from the service member's record, and again requested the Casualty Office assist in applying for Death Gratuity. In discussion, counsel contended the claim accrual date was miscalculated by DFAS stating the service member died on 16 Aug 09; however, DVA certified eligibility for Death Gratuity on 18 Mar 20 for the first time. Both DFAS and DOHA erred when they failed to consider the lack of eligibility for a death not occurring within 120 days from active duty instead of the Barring Act. The United States government created an impossibility for the applicant to make an application for Death Gratuity as it is made exclusively through the appointed Casualty Assistance Officer, who refused to act notwithstanding the applicant's request.

The applicant's complete responses are at Exhibits E, F and G.

## **FINDINGS AND CONCLUSION**

1. The application was not timely filed, but it is in the interest of justice to excuse the delay.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board concludes the applicant is the victim of an error or injustice. The Board concurs with the rationale and recommendation of AFPC/DPFCS and finds a preponderance of the evidence substantiates the applicant's contentions. The applicant was erroneously denied application for Death Gratuity due to the service member's incorrect/missing active duty history in his official military records. Correction of the service member's active duty history, in combination with DVA's determination of service-connection and eligibility for Death Gratuity, establishes the claim accrual date of 17 Aug 10, which the applicant would have met but for the aforementioned error, rendering DFAS and DOHA application of the Barring Act moot. Therefore, the Board recommends correcting the applicant's records as indicated below.

## **RECOMMENDATION**

The pertinent military records of the Department of the Air Force relating to SERVICE MEMBER be corrected to show on 17 Aug 10, APPLICANT submitted a timely and effective claim for Death Gratuity payment.

## **CERTIFICATION**

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2021-03155 in Executive Session on 20 Jul 23:

, Panel Chair  
, Panel Member  
, Panel Member

All members voted to correct the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 18 Aug 21.  
Exhibit B: Documentary evidence, including relevant excerpts from official records.

- Exhibit C: Advisory opinion, AFPC/DPFCS, w/atch, dated 31 Mar 23.
- Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 6 Apr 23.
- Exhibit E: Applicant's response, dated 25 Apr 23.
- Exhibit F: Applicant's Motion for Reconsideration, w/atchs, dated 18 May 23.
- Exhibit G: Applicant's supplemental response, dated 29 Jun 23.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

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Board Operations Manager, AFBCMR